Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

McDONNELL DOUGLAS CORPORATION,
a wholly-owned subsidiary of The Boeing Company,
Petitioner,

v.

LONNIE C. STAFFORD, *Respondent*.

McDONNELL DOUGLAS CORPORATION,
a wholly-owned subsidiary of The Boeing Company,
Petitioner,

v.

LACY KIRK SYKES, JR., *Respondent*.

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. What additional evidence, if any, must a removing defendant adduce in order to satisfy the "amount in controversy" requirement for diversity jurisdiction in an employment discrimination case, where the existence of such amount was alleged in the notice of removal and was never challenged by any party or by the District Court?

II. In an employment discrimination case which the defendant removed without objection to federal court, did the Court of Appeals have authority to issue a *sua sponte*, summary order vacating the District Court's grant of summary judgment and ordering the case remanded back to state court on the grounds that the defendant failed to satisfy the "amount in controversy" requirement for diversity jurisdiction, where the District Court expressly found that the amount in controversy exceeded the jurisdictional minimum, where the plaintiff expressly admitted in his jurisdictional statement to the Court of Appeals that the requisite amount in controversy existed, and where the Court of Appeals cited to no evidence in support of its contrary finding? (NOTE: This question pertains only to the *Stafford* lawsuit.)

III. Is the answer to Question II the same in an employment discrimination case where the District Court made no express finding regarding the amount in controversy, and where the plaintiff made no express admission that the requisite amount in controversy existed, but where it nevertheless was not disputed before the District Court that the amount in controversy exceeded the jurisdictional minimum? (NOTE: This question pertains only to the *Sykes* lawsuit.)

RULE 29.1 LISTING

Petitioner McDonnell Douglas Corporation's parent company is The Boeing Company. Petitioner has no subsidiary companies, other than wholly-owned subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Petitioner McDonnell Douglas Corporation ("MDC") respectfully petitions for a writ of certiorari to review two Orders of the United States Court of Appeals for the Ninth Circuit, dismissing the appeals from separate judgments of Respondents Lonnie C. Stafford ("Stafford") and Lacy Kirk Sykes, Jr. ("Sykes") (collectively "Respondents") and remanding both cases to the United States District Court for the Central District of California with directions to remand the cases to state court (the "Orders of Dismissal").

OPINIONS BELOW

The orders of the Court of Appeals (App., *infra*, B-1, C-1, D-1, E-1, G-1, H-1, I-1, J-1) and the District Court (App., *infra*, A-1, F-1) are unreported.

JURISDICTION

The Court of Appeals filed its Orders of Dismissal in the *Stafford* and *Sykes* cases on November 7, 1996 (App., *infra*, C-1, G-1), and filed its Orders rejecting MDC's Petitions for Rehearing with Suggestion for Rehearing *En Banc* in both cases on September 16, 1997. (App., *infra*, E-1, J-1.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The applicable statutory provision regarding federal court jurisdiction based on diversity of citizenship is 28 U.S.C. § 1332(a), which provided at the time this case was removed to the District Court that "[t]he district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between— [¶] (1) citizens of different States . . . ." In addition, 28 U.S.C § 1332(c) provides, in pertinent part, that "[f]or the purposes of this section and section 1441 of this title— [¶] (1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business . . . ."

The applicable statutory provision regarding removal jurisdiction is 28 U.S.C. § 1441(a), which states:

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. . . .

STATEMENT OF THE CASE

A. Proceedings Before The District Court In *Stafford v. MDC*

Stafford filed his lawsuit against MDC in the Superior Court of California for the County of Los Angeles on July 21, 1994. On August 24, 1994, *i.e.*, less than 30 days after MDC received a copy of Stafford's original Complaint, MDC filed a Notice of Removal in the District Court pursuant to 28 U.S.C. §§ 1332 and 1441, based on complete diversity of citizenship of the parties[1] and an amount in controversy exceeding the then-applicable statutory threshold of $50,000.[2] MDC specifically identified the claims in Stafford's Amended Complaint for general, special and

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[1]At the time of removal, MDC was incorporated in Maryland and had its principal place of business in Missouri, and Stafford was a citizen of California. Stafford has never disputed the existence of complete diversity, and the District Court expressly found diversity to exist. (App., *infra*, A-4.) The Court of Appeals did not take issue with the District Court's finding in this regard.

[2]Effective January 1, 1997, *i.e.*, after the Court of Appeals' Order of Dismissal in this case, 28 U.S.C. § 1332(a) was amended to raise the "amount in controversy" requirement to $75,000.

punitive damages as grounds for alleging that Stafford would seek to recover more than $50,000 in this action, exclusive of interest and costs.

The gravamen of Stafford's Amended Complaint was his allegation that MDC terminated him on April 9, 1993, after nearly 30 years of employment, because of his race (African-American) and/or his age (56 at the time of his layoff), in violation of the California Fair Employment and Housing Act (the "FEHA"), Cal. Gov't Code § 12940 *et seq.* Stafford alleged that MDC had "engaged in a pattern and practice of race discrimination," and that its purported discriminatory conduct was "intentional, willful, wanton, malicious and . . . intended to vex, annoy and injure plaintiff."[3] Stafford sought damages for lost wages and benefits, emotional distress damages, punitive damages and statutory attorneys' fees pursuant to the California FEHA, Cal. Gov't Code § 12965(b). The Amended Complaint did not specify a dollar amount of damages requested.

At no time did Stafford ever seek to have the instant case remanded to state court, nor did Stafford ever dispute MDC's assertion that he sought to recover more than $50,000. Instead, the case proceeded in the District Court for several months, during which time both parties conducted extensive pretrial discovery. The record on appeal reflects depositions of no fewer than eight witnesses, including Stafford, whose deposition lasted four days and resulted in a 1,121-page transcript.

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[3]The Amended Complaint also included state-law claims for breach of implied contract, breach of the implied covenant of good faith and fair dealing, and intentional infliction of emotional distress. Stafford abandoned the latter claim on appeal.

On April 24, 1995, MDC filed a Motion for Summary Judgment or, Alternatively, Partial Summary Judgment (the "Summary Judgment Motion").[4] While Stafford filed an Opposition to MDC's Summary Judgment Motion, he did not purport to question the District Court's jurisdiction with respect to his lawsuit, and specifically did not contend that the amount in controversy was $50,000 or less. Instead, Stafford argued that triable issues of fact existed as to his claims for race and age discrimination and for punitive damages.

The District Court (Hon. Ronald S.W. Lew) issued an unpublished Order Granting Defendant's Motion for Summary Judgment, and expressly found that diversity jurisdiction existed and that the amount in controversy herein exceeded $50,000. (App., *infra*, A-4.) The District Court

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[4]MDC submitted several documentary exhibits in support of this Motion, including an Employee Status Change Notice ("ESCN") which was issued with respect to a disability leave Stafford took before his layoff became effective. Because MDC's Summary Judgment Motion did not contain any argument regarding jurisdiction (the existence of which was addressed in MDC's Notice of Removal and not challenged by Stafford), the ESCN was not submitted for the specific purpose of confirming the amount in controversy. Instead, the ESCN was offered to show Stafford's last day on the job before taking his disability leave. Nevertheless, this ESCN indicates that Stafford was a "salaried" employee and that his "pure base rate" was $946 per week, although no testimony was presented to explain that the "pure base rate" reference on the ESCN pertained to weekly base salary. Based on the ESCN and Stafford's termination date of April 9, 1993, Stafford's alleged lost wages arguably exceeded $65,000 as of the time he filed his Amended Complaint.

entered its final Judgment dismissing the action with prejudice on June 28, 1995.

B. Proceedings Before The District Court In *Sykes v. MDC*

Sykes filed his lawsuit against MDC in the Superior Court of California for the County of Orange on December 9, 1993. On Decmeber 28, 1993, MDC filed a Notice of Removal in the District Court pursuant to 28 U.S.C. §§ 1332 and 1441, based on complete diversity of citizenship of the parties[5] and an amount in controversy exceeding $50,000.

Sykes, who was employed at a different MDC facility than Stafford, likewise contended that MDC terminated him because of his race (African-American), in violation of the California FEHA, and further alleged that MDC acted with "malice, fraud or oppression and in reckless disregard of [Sykes's] rights under the [FEHA]."[6] Sykes sought damages for lost earnings and benefits, emotional distress damages, punitive damages and statutory attorneys' fees pursuant to the FEHA. Sykes's Complaint did not specify a dollar amount of damages requested.

The District Court (Hon. David V. Kenyon) filed an unpublished Order Granting Defendant's Motion for Summary Judgment on February 1, 1995 (App., *infra*, F-1),

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[5]Sykes, like Stafford, was a citizen of California at the time of removal, and never has disputed that complete diversity of citizenship exists between himself and MDC.

[6]Sykes's Complaint also included state-law claims for breach of contract and breach of the implied covenant of good faith and fair dealing.

and entered its final Judgment dismissing the action with prejudice on May 26, 1995. The District Court's Order did not include any express findings with respect to jurisdiction. However, Sykes never sought to have his lawsuit remanded to state court and never disputed MDC's assertion that the amount in controversy exceeded $50,000.

C. Proceedings Before The Court Of Appeals

Although Stafford and Sykes both argued for reversal of the District Court's judgments in their respective lawsuits on several grounds, neither Respondent purported to challenge the exercise of federal court jurisdiction. Sykes's Opening Brief filed with the Ninth Circuit Court of Appeals simply did not address the "amount in controversy" requirement. However, in the Jurisdictional Statement on page 1 of Stafford's Opening Brief on appeal, Stafford expressly admitted that "[m]ore than $50,000 is in controversy."

On October 30, 1996, the Court of Appeals issued an Order with respect to Stafford's appeal stating that the case would be submitted on the briefs and record on November 4, 1996. This Order specifically noted that "[t]he judges on the panel to which this case has been assigned have unanimously determined that *the facts and legal arguments are adequately presented in the briefs and record* and the decisional process would not be significantly aided by oral argument." (App., *infra*, B-1, emphasis added.) The Court of Appeals likewise submitted Sykes's appeal on the briefs and without oral argument.

On November 7, 1996, the Court of Appeals issued identical, unpublished, one-paragraph Orders of Dismissal in the *Stafford* and *Sykes* cases, wherein it summarily dismissed both appeals and vacated the District Court's judgments

"with instructions to remand the case[s] to the state court for lack of subject matter jurisdiction," based on its finding that MDC "failed to establish the requisite amount in controversy pursuant to 28 U.S.C. §§ 1332 and 1441."[7] (App., *infra*, C-2, G-2.) These Orders cited to no evidence whatsoever, and did not specify which of the "adequately presented" facts in the record the Court of Appeals considered in making its findings with respect to the amount in controversy.

Nor did the Court of Appeals indicate which "legal arguments" in the briefs it considered. In fact, *none of the parties made any legal arguments* which advocated the decisions the Court of Appeals rendered. The Court of Appeals cited to two cases in its Orders of Dismissal, but offered no discussion regarding why it apparently found these cases controlling herein. (App., *infra*, C-2, G-2, citing *Sanchez v. Monumental Life Ins. Co.*, 95 F.3d 856 (9th Cir. 1996), and *Gaus v. Miles, Inc.*, 980 F.2d 564 (9th Cir. 1992).)

On November 21, 1996, MDC timely filed a Petition for Rehearing with Suggestion for Rehearing *En Banc* with the Court of Appeals in the *Stafford* case, in which it argued that the "amount in controversy" requirement in that case was satisified. On April 11, 1997, the Court of Appeals ordered Stafford to file a Response to this Petition for Rehearing. (App., *infra*, D-1.) In his Response to the Petition for Rehearing, Stafford contended for the first time that MDC had failed to meet its burden of proof that the damages are not $50,000 or less. However, Stafford did not purport to

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[7]The Court of Appeals did not specify whether it found that subject matter jurisdiction was ostensibly lacking at the time of removal, or at the time of judgment, or both.

retract his own admission as to the amount in controversy, but instead described this admission as "unsubstantiated" and argued that MDC had failed to establish to a "legal certainty" that the amount in controversy exceeded $50,000.[8]

On May 15, 1997, the Court of Appeals granted MDC's Motion for Leave to File a Petition for Rehearing and Suggestion for Rehearing *En Banc* in the *Sykes* case. (App., *infra*, H-1.) MDC filed its Petition for Rehearing and Suggestion for Rehearing *En Banc* with the Court of Appeals that same day, arguing that the "amount in contorversy" requirement was satisfied in the *Sykes* case. On June 4, 1997, the Court of Appeals issued an Order requesting Sykes to file a Response to this Petition for Rehearing. (App., *infra*, I-1.) Sykes failed to file any such Response.

Nevertheless, on September 16, 1997, the Court of Appeals issued identical, unpublished Orders in both the *Stafford* and *Sykes* appeals, summarily denying MDC's Petitions for Rehearing and rejecting its Suggestions for Rehearing *En Banc*. (App., *infra*, E-1, J-1.)

REASONS FOR GRANTING THE PETITION

Petitioner is unaware of any decision by this Court which addresses the circumstances under which the Court of Appeals is, or is not, authorized to vacate a District Court judgment and reverse the District Court's finding that the "amount in controversy" requirement was satisfied in a

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[8]Stafford appeared to argue in this Response that the ESCN submitted with MDC's Summary Judgment Motion (*see* p. 5, fn. 4, *supra*) was not authenticated. However, Stafford did not raise any such objection regarding this document before the District Court.

diversity case where, as here, the issue was not disputed before the District Court. Nor is Petitioner aware of any decision by this Court which discusses what further evidence, if any, a removing party must adduce to satisfy the "amount in controversy" requirement in such a case. These questions, however, have profound implications on the fair and efficient administration of justice, as well as on the relationship between federal and state courts. Moreover, the summary — and erroneous — manner in which the Ninth Circuit resolved the jurisdictional issues herein conflicts in principle with decisions of this Court and other federal courts, and demonstrates a clear need for this Court's guidance.

I. The Questions Presented Are Important

As reflected by the District Court's detailed Orders granting summary judgment in both the *Stafford* and *Sykes* lawsuits (App., *infra*, A-1, F-1), and the lengthy excerpts of record before the Court of Appeals, the District Court's judgment in these cases was based on voluminous evidentiary submissions by the parties, after months of discovery, as well as on extensive legal research and analysis by the parties and the District Court. The Ninth Circuit's Orders of Dismissal, however, would require the state courts in both cases to duplicate the entire process already undertaken by the District Court, and would result in additional expenditure of time and resources by the parties regarding issues which already have been adjudicated.

As this Court recently observed, "[o]nce a diversity case has been tried in federal court, with rules of decision supplied by state law under the regime of *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938), considerations of finality, efficiency, and economy become overwhelming." *Caterpillar, Inc. v. Lewis*, 519

U.S. __, 117 S. Ct. 467, 136 L. Ed. 2d 437, 451 (1996). These considerations should be no less compelling here, even though the District Court's grant of summary judgment after the close of discovery in both cases foreclosed any trials.

In *Caterpillar*, there was no dispute that complete diversity of citizenship existed at the time the District Court entered judgment, even though it was lacking at the time the case was removed to federal court. This Court held that the Court of Appeals cannot vacate a District Court judgment based on the erroneous denial of a motion to remand the case to state court, unless, "at the end of the day and case, a *jurisdictional* defect remains uncured." *Caterpillar*, 136 L. Ed. 2d at 452 (emphasis original). The Court reasoned that under such circumstances, "'[r]equiring dismissal after years of litigation . . . would impose unnecessary and wasteful burdens on the parties, judges, and other litigants waiting for judicial attention,'" *id.* at 451 (citation omitted), and also "would impose an exorbitant cost on our dual court system, a cost incompatible with the fair and unprotracted administration of justice." *Id.* at 452.

It is unclear whether or not the Ninth Circuit's decisions in these cases conflict directly with *Caterpillar* because the Ninth Circuit did not specify whether it found subject matter jurisdiction lacking at the time of removal or at the time summary judgment was granted and entered, or both. Assuming *arguendo* that the Ninth Circuit found the "amount in controversy" requirement was not satisfied at *any* point in the instant cases, the holding in *Caterpillar* would not be implicated directly by the Ninth Circuit's decisions herein.

Nevertheless, the "considerations of finality, efficiency, and economy" articulated in *Caterpillar* are highly germane to the issue of whether the Court of Appeals herein was

authorized to disregard the District Court's express finding of jurisdiction in the *Stafford* case, make its own contrary findings in both cases and require the parties to relitigate these cases in state court. The importance of these considerations makes the *sua sponte*, summary manner in which the Ninth Circuit disposed of these cases all the more mystifying and inappropriate, and further demonstrates the need for this Court's review.

II. The Decisions Of The Court of Appeals Conflict In Principle With Decisions Of This Court And Other Federal Courts

The precedents of this Court and other federal courts indicate strongly that appellate courts should be highly deferential to a District Court's jurisdictional findings, whether such findings are express (as in *Stafford*) or implied (as in *Sykes*). This is especially true where, as here, no jurisdictional objections were raised before the District Court. In *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 56 S. Ct. 780, 80 L. Ed. 1135 (1936), this Court used deferential language in discussing the District Court's authority under such circumstances:

> The authority which the statute vests in the court to enforce the limitations of its jurisdiction precludes the idea that jurisdiction may be maintained by mere averment or that the party asserting jurisdiction may be relieved of his burden by any formal procedure. *If* his allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof. And *where they are not so challenged* the court *may insist* that the jurisdictional facts be established or the case be dismissed, and for that purpose the court *may demand* that the party alleging

> jurisdiction justify his allegations by a preponderance of the evidence.

Id. at 189 (emphasis added). The Court's use of the permissive "may" in this passage strongly suggests that, in the absence of a motion to remand, the District Court has *discretion* whether to "demand" a specific evidentiary showing in support of removal jurisdiction.

Similarly, this Court recently observed that, by enacting the removal statutes, "Congress ordered a procedure calling for expeditious superintendence *by district courts*." *Caterpillar*, 136 L. Ed. 2d at 452 (emphasis added). Indeed, the Court of Appeals is expressly precluded by statute from reviewing most District Court orders remanding cases to state courts, 28 U.S.C. § 1447(d), and this Court's decision in *Caterpillar* also bars appellate review of refusals to remand in cases where jurisdiction exists at the time of the District Court's judgment.

Prior to *Caterpillar*, this Court held that where *no* motion to remand or other objection to removal jurisdiction was made before the District Court, and where the District Court had jurisdiction at the time of judgment, "the validity of the removal procedure followed may not be raised for the first time on appeal," even by the Court of Appeals. *Grubbs v. General Elec. Credit Corp.*, 405 U.S. 699, 700, 702, 92 S. Ct. 1344, 31 L. Ed. 2d 612 (1972). In *Caterpillar*, this Court stated that "*Grubbs* . . . dealt with a case removed without objection" and, therefore, was "not dispositive" of the issue presented in *Caterpillar*, where the plaintiff timely objected to removal. *Caterpillar*, 136 L. Ed. 2d at 449. Thus, while this Court in *Caterpillar* found *Grubbs* to be a "key case[] in point," *id.* at 448, and reached the same result in *Caterpillar* as it had in *Grubbs*, the distinction the Court

drew between the facts of these two cases indicate that the absence of a motion to remand before the District Court is, at the very least, relevant to determining whether the District Court's jurisdictional findings are entitled to deference.

The instant cases illustrate the sound policy reasons for according weight to the plaintiff's failure to object to jurisdiction before the District Court. Although MDC, as the removing defendant in both cases, bore the burden of proving the requisite amount in controversy, Respondents Stafford and Sykes presumably would have apprised the District Court if they actually sought to recover an amount *less* than the jurisdictional threshold. Of course, had Respondents made such representations, they would have risked being precluded from obtaining any recovery in state court which exceeds the federal jurisdictional minimum. Conversely, by *not* disputing that the amount in controversy is sufficient to establish jurisdiction, Respondents avoided placing any such limits on their potential recovery.

The District Court in both cases, therefore, could well have viewed Respondents' failure to seek remand as a *tacit concession* that the "amount in controversy" requirement had been satisfied. Whether or not such a tacit concession by the plaintiff is conclusive by itself, it should at least be deemed *persuasive evidence* on the jurisdictional issue, particularly in the absence of any contrary evidence.

Moreover, as noted above, Stafford not only tacitly conceded the jurisdictional issue before the District Court, he *expressly admitted* that "[m]ore than $50,000 is in controversy" in his Opening Brief before the Ninth Circuit. This further confirms that the District Court could reasonably have construed Stafford's previous silence on this issue as

evidence which tended to prove the existence of the requisite amount in controversy.

The Ninth Circuit offered no explanation for its apparent disregard of Respondents' tacit and express admissions regarding the amount in controversy herein. Its only suggestion on this issue was its citation to *Gaus v. Miles, Inc.*, 980 F.2d 564 (9th Cir. 1992) (per curiam), where it also had vacated a District Court judgment and ordered the case remanded to state court, despite plaintiff's argument in a supplemental brief on appeal that "the actual damages sought [were] 'in the millions of dollars.'" *Id.* at 566. Yet, the Ninth Circuit in *Gaus* stopped short of declaring that a plaintiff's post-removal assertions regarding the amount in controversy are *per se* irrelevant, and its opinion in that case does not explain its apparent decision herein to completely disregard Respondents' tacit admissions, and Stafford's express admissions, in this regard.

The Ninth Circuit's summary decisions in the *Stafford* and *Sykes* cases, as well as its opinion in *Gaus*, are contrary to the principles enunciated by the Eleventh Circuit in an opinion which explains persuasively why assertions by the plaintiff's counsel regarding the amount in controversy should not be taken lightly:

> . . . Every lawyer is an officer of the court. And, in addition to his duty of diligently researching his client's case, he always has a duty of candor to the tribunal. So, plaintiff's claim, when it is specific and in a pleading signed by a lawyer, deserves deference and a presumption of truth. We will not assume — unless given reason to do so — that plaintiff's counsel has falsely represented, or simply does not appreciate, the value of his client's case. Instead, we will assume that plaintiff's counsel best

> knows the value of his client's case and that counsel is engaging in no deception. We will further presume that plaintiff's counsel understands that, because federal removal jurisdiction is in part determined by the amount of damages a plaintiff seeks, the counsel's choices and representations about damages have important legal consequences and, therefore, raise significant ethical implications for a court officer.

Burns v. Windsor Ins. Co., 31 F.3d 1092, 1095 (11th Cir. 1994). In *Burns*, the court held that where the complaint expressly seeks damages of less than $50,000, a removing defendant "must prove to a legal certainty" that this assessment is false or incompetent in order to satisfy the "amount in controversy" requirement. *Id.*

Moreover, the Ninth Circuit itself previously held that a plaintiff's tacit admissions with respect to the parties' citizenship may be binding in a case removed to federal court on diversity grounds. *Albrecht v. Lund*, 845 F.2d 193, 195 (9th Cir. 1988). The Ninth Circuit offered no explanation in the instant cases, or in *Gaus*, for treating a plaintiff's admissions regarding the "amount in controversy" requirement any differently than it treated the plaintiff's tacit admission regarding the "diversity of citizenship" requirement in *Albrecht*.

Although Respondents' implicit and explicit admissions regarding the amount in controversy were made *after* the cases were removed to federal court, this should not diminish the persuasive weight to which such admissions are entitled. As this Court has held, where the case is "instituted in a state court and thence removed," and where the plaintiff's complaint seeks recovery in excess of the federal "amount in controversy" requirement, "[t]here is a *strong presumption*

that the plaintiff has *not* claimed a large amount in order to confer jurisdiction on a Federal court or that the parties have colluded to that end," whereas in *original* actions a plaintiff and defendant may collude "to confer jurisdiction by the method of the one claiming a fictitious amount and the other failing to deny the veracity of the averment of amount in controversy." *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 290-91, 58 S. Ct. 586, 82 L. Ed. 845 (1938) (emphasis added) (plaintiff's post-removal attempt to reduce the amount in controversy does not oust federal court of jurisdiction). This "strong presumption" in favor of the veracity of the plaintiff's jurisdictional allegations should apply with equal force where, as here, the allegations were made after the defendant removed the case from the plaintiff's forum of choice.

Many federal court decisions also provide that the District Court may base its finding as to the amount in controversy on the nature of the allegations in the plaintiff's complaint. Even where the complaint does not specify the dollar amount of damages requested, courts have found that the factual allegations, legal claims and nature of relief requested in the complaint may be sufficient to establish that the amount in controversy exceeds the jurisdictional minimum.[9]

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[9]*See, e.g., Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, 1357-59 (11th Cir. 1996) (amount in controversy requirement satisfied based on punitive damage claim, even though complaint did not specify amount of damages); *DeAguilar v. Boeing Co.*, 11 F.3d 55, 57 (5th Cir. 1993) ("although the complaint in the instant case did not specify an amount of damages, it is facially apparent that damages sought by the plaintiffs here exceed $50,000," based on the nature of plaintiffs' tort claims).

This principle is particularly apt where, as here, the complaint alleges employment discrimination and seeks damages for emotional distress and punitive damages. At least one federal court has expressly held that a plaintiff's prayer for emotional injuries and other damages in an employment discrimination case was sufficient, in and of itself, to establish that the amount in controversy exceeded $50,000. *Pakledinaz v. Consolidated Rail Corp.*, 737 F. Supp. 47, 48 (E.D. Mich. 1990).

This Court also has held that a plaintiff's request for attorneys' fees, if authorized by applicable law, must be considered in determining whether the amount in controversy exceeds the jurisdictional minimum. *Missouri St. Life Ins. Co. v. Jones*, 290 U.S. 199, 202, 54 S. Ct. 193, 78 L. Ed. 267 (1933). The foregoing cases support the conclusion that the inclusion of such an attorney fee request may be sufficient in and of itself to establish jurisdiction, regardless of whether the plaintiff's complaint requests a specific amount of fees, if it appears more likely than not that such fees ultimately will exceed the jurisdictional threshold.

Even in cases where it is not clear on the face of the complaint itself whether the amount in controversy exceeds the jurisdictional minimum, several federal courts have held that a District Court may properly rely on a defendant's jurisdictional allegations in the Notice of Removal in ascertaining the amount in controversy.[10]

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[10]*See, e.g., Lonnquist v. J.C. Penney Co.*, 421 F.2d 597, 599 (10th Cir. 1970); *Davenport v. Proctor & Gamble Mfg. Co.*, 241 F.2d 511, 514 (2d Cir. 1957); *Kennard v. Harris Corp.*, 728 F. Supp. 453, 454-55 (E.D. Mich. 1989); *Kilpatrick v. Martin K. Eby Constr. Co.*, 708 F. Supp. 1241, 1242 (N.D. Ala. 1989) (plaintiff cannot prevent removal by concealment or fraudulent allegations).

In the *Stafford* and *Sykes* cases, however, the Ninth Circuit evidently disregarded Respondents' implied and express jurisdictional admissions, the nature of the claims and relief requested in their respective pleadings and the jurisdictional allegations in MDC's Notices of Removal. Although the Ninth Circuit provided no explanation for its decisions in these cases, its Orders of Dismissal reflect the Ninth Circuit's continued adherence to its holding in *Gaus* that there exists a "*'strong presumption' against removal jurisdiction*" which does not apply to cases originally brought in federal court. *Gaus*, 980 F.2d at 566 (emphasis added).

Contrary to the Ninth Circuit's assertions in *Gaus*, however, this Court did *not* create any special "strong presumption" against removal in *St. Paul*. Instead, as noted above at pages 16-17, the "strong presumption" stated in *St. Paul* runs in favor of the veracity of the plaintiff's allegations regarding the amount in controversy in a removal case.

The Ninth Circuit's erroneous interpretation of *St. Paul* may well explain its summary disposition of the *Stafford* and *Sykes* cases. However, Petitioner submits that the above-cited decisions of this Court and other federal courts stand for the principle that a District Court's findings regarding the amount in controversy are entitled to far more deference than that which the Ninth Circuit displayed herein. Accordingly, this Court should grant certiorari in order to resolve this conflict in principle.

See generally 14A C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE & PROCEDURE, § 3725, at 417-18 (1985).

III. The Decisions Of The Court Of Appeals Are Erroneous

The Court of Appeals offered no citations to the record, nor did it provide any discussion, to support its finding that MDC failed to establish the requisite amount in controversy in the *Stafford* or *Sykes* cases. Petitioner submits that the record in both cases provides no support for the disposition by the Court of Appeals, and that the District Court's exercise of jurisdiction in both cases should have been left undisturbed.

As discussed above, Respondents never challenged MDC's invocation of federal court jurisdiction in these cases, thus impliedly conceding that the allegations in MDC's Notices of Removal regarding the amount in controversy were true. Moreover, Stafford expressly admitted in his jurisdictional statement to the Court of Appeals that the amount in controversy exceeds $50,000. There is nothing in the record which contradicts these implied and express admissions by Respondents.

The amount in controversy in both cases was further established by Respondents' allegations of employment discrimination and their prayers for relief, which included requests for lost wages, emotional distress damages, punitive damages and attorneys' fees. It would be a rare plaintiff who did not seek more than $50,000 in emotional distress and punitive damages in an employment discrimination case under California law, as jury awards in such cases often exceed that figure. *See, e.g., Stephens v. Coldwell Banker Commercial Group*, 199 Cal. App. 3d 1394, 1399, 245 Cal. Rptr. 606 (1988) (affirming jury award of $100,000 for emotional distress damages and $200,000 in punitive damages based on

alleged age discrimination).[11] Likewise, Respondents' requests for attorneys' fees were authorized under the California FEHA, Cal. Gov't Code § 12965(b), and it is quite likely that both Respondents would have sought to recover more than $50,000 in attorneys' fees if these cases had gone to trial. *See, e.g., EEOC v. Bruno's Restaurant*, 13 F.3d 285 (9th Cir. 1993) (district court award of $76,176.25 to prevailing defendant in discrimination case remanded on factual grounds).

The Ninth Circuit disregarded the allegations in Respondents' pleadings and MDC's removal papers, as well as Respondents' tacit and express admissions regarding the amount in controversy, and *sua sponte* issued summary orders overturning District Court judgments which could properly have relied on any or all of these considerations. In so doing, the Ninth Circuit in the instant cases, as well as in *Gaus*, completely disregarded the "considerations of finality, efficiency, and economy" as identified by this Court in *Caterpillar*, and ordered needless remands to state court which will serve only to frustrate each of these important

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[11]In *Lane v. Hughes Aircraft Co.*, 56 Cal. App. 4th 1038, 1075, 65 Cal. Rptr. 2d 889, *review granted*, 1997 Cal. LEXIS 7666 (1997), a race discrimination and retaliation case, the California Court of Appeal affirmed jury awards to two plaintiffs for emotional distress and other noneconomic damages of $3.5 million and $2 million, respectively, while reducing the punitive damage awards from *$40 million* for each plaintiff to $5 million and $2.83 million, respectively. Although the appellate court's opinion in *Lane* is not citable authority in California courts due to the grant of review by the California Supreme Court (CAL. R. CT. 976(d), 977(a)), the jury awards in that case further demonstrate the utter implausibility of the Ninth Circuit's finding that the amount in controversy herein did not exceed $50,000.

values. Such a drastic result would be patently unfair to the District Court in both cases and would impose tremendous burdens on all parties and the state courts, and thus should be avoided at all reasonable costs.[12]

Petitioner respectfully submits that it would be appropriate for this Court to summarily reverse the Ninth Circuit's Orders of Dismissal and direct that court to consider Stafford's and Sykes's respective appeals from the District Court's judgments on their merits. At a minimum, the Ninth Circuit's directions on remand should be modified to permit the District Court to further clarify the basis for its exercise of subject matter jurisdiction. In any event, the foregoing discussion demonstrates that litigants and federal jurists alike would benefit greatly from this Court's guidance on, and resolution of, the important jurisdictional issues raised herein.

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[12]The Ninth Circuit's purported reliance herein on *Sanchez v. Monumental Life Ins. Co.*, 95 F.3d 856 (9th Cir. 1996), is puzzling, since *Sanchez* bears no factual similarity to the *Stafford* or *Sykes* cases. The evidence in *Sanchez* showed that the plaintiff sought contract damages of only $12,500, and the defendant's assertion that the amount in controversy exceeded $50,000 was "entirely premised on a misinterpretation" of a statute which, contrary to defendant's assertion, did not provide for the trebling of such contract damages. *Id.* at 863. The defendant in *Sanchez* also provided "absolutely no evidence" to support its suggestion that the loss which it might have incurred in the event of an injunction would exceed the jurisdictional amount. *Id.* By stark contrast, it would strain credulity to assert that the amount in controversy with respect to Stafford's and Sykes' respective employment discrimination lawsuits does not exceed $50,000.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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DATED: December 11, 1997

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FILED JUN 27 1995
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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LONNIE C. STAFFORD,	)	CV 94-5771-RSWL (Kx)
	)	
Plaintiff,	)	**ORDER GRANTING**
	)	**DEFENDANT'S**
v.	)	**MOTION FOR**
	)	**SUMMARY**
MCDONNELL DOUGLAS	)	**JUDGMENT**
CORPORATION, a	)	
corporation, DOES 1 - 25	)	THIS CONSTITUTES
	)	NOTICE OF ENTRY AS
Defendant.	)	REQUIRED BY FRCP,
	)	RULE 77(d).

I. Introduction

This matter was set for oral argument on May 22, 1995, but was removed from the Court's law and motions calendar under Fed.R. Civ. P. 78 for disposition based on the papers filed. Plaintiff Lonnie Stafford ("Stafford") is a former employee of Defendant McDonnell Douglas Corporation ("MDC"). He was discharged in 1993 and subsequently filed a suit, alleging that his termination violated California statutes prohibiting race and age-based discrimination, and that his discharge was a breach of contract. MDC now moves for summary judgment on Stafford's action. Because

Stafford fails to demonstrate a genuine issue of material fact as to whether MDC's reason for terminating him was pretextual, and because Stafford fails to bring forth sufficient evidence of a genuine issue of material fact on his other claims, MDC's motion is hereby GRANTED.

II. Background

Plaintiff Stafford is a former MDC employee whose termination was effective as of April 1993. MDC maintains that this termination was a reduction in force ("RIF") pursuant to adverse economic conditions affecting MDC and the entire aerospace industry. MDC points to a series of layoffs and plant closings made by MDC starting in early 1990, noting that since 1990 MDC has reduced its West Coast workforce by more than 25,000 employees. The Torrance facility at which Stafford worked was particularly hard-hit by MDC's reductions; its workforce decreased from 5,000 employees in 1990 to less than 800 in early 1993. All manufacturing operations at the Torrance facility ceased in mid-1994.

Stafford contends that he was laid off due to race and age-based bias. Stafford is African-American and, at the time of the layoff decision, was 56 years old. He was hired by MDC's predecessor, Douglas Aircraft Company ("DAC"), now an unincorporated component of MDC, in 1964. In 1989, Stafford was made a Group Leader or a foreman in the Machine Products Department at DAC's facility in Torrance. Starting in July 1992, Stafford's immediate supervisor was Business Unit Manager James Miller ("Miller").

The number of Group Leaders in the Torrance Machine Products Department was reduced from 35 in 1990 to 12 as

of January 1993. In January 1993, DAC management told Miller to cut three Group Leader positions. In order to choose the three Group Leaders to be laid off, Miller called the Machine Products Group leaders into a "peer ranking meeting." At this meeting, the Group Leaders were given pre-printed matrix forms on which they ranked each other according to ability. Stafford asserts that he did not attend this meeting. Stafford further asserts that none of the Group Leaders knew that the peer ranking related to further layoffs; this peer ranking had been previously used to determine compensation scales.

Miller's secretary tabulated the peer rankings and gave the results to Miller. Stafford was ranked twelfth, last place, overall.[1] Miller states that this ranking conformed with his personal evaluation of Stafford. Miller further maintains that, if he had believed these peer rankings to be inaccurate or otherwise unreliable, he would have revised the rankings. Miller then prepared a "totem pole" listing the Group Leaders' relative qualifications. Subsequently, he notified Stafford and the two other lowest-ranked employees in the department that they would be laid off effective April 9, 1993. Stafford was 56 years old when he was notified; the two other Group Leaders who were laid off were white males aged 45 and 54, respectively.

On July 21, 1994, Stafford filed suit against MDC in state superior court, alleging racial and age discrimination in violation of the Fair Employment and Housing Act

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[1] MDC maintains and Stafford does not dispute that even if Stafford had attended the peer ranking meeting and had submitted a matrix ranking himself first, he still would have been ranked lowest.

('FEHA"), Cal. Gov't Code § 12940, breach of implied contract, breach of implied covenant of good faith and fair dealing, and intentional infliction of emotional distress. MDC removed this action to federal court on the grounds of diversity jurisdiction.

III. Discussion

A. Subject Matter Jurisdiction Based on Diversity of Citizenship.

This court has jurisdiction over this action based on diversity of citizenship, pursuant to 28 U.S.C. § 1332(c). Plaintiff is a California citizen. Defendant MDC is a corporation incorporated under the laws of Maryland. Its principal place of business is in Missouri. It therefore is a citizen of Maryland and Missouri, and there is complete diversity between the parties. More than $50,000.00 is in controversy in this action. The Court therefore has subject matter jurisdiction over this matter.

B. Standard for Summary Judgment

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. Where the moving party does not have the burden of proof at trial on a dispositive issue, the moving party may meet its burden for summary judgment by showing an "absence of evidence" to support the non-moving party's case. Celotex v. Catrett, 477 U.S. 317, 325, 106 S.Ct. 2548, 2554 (1986).

The non-moving party, on the other hand, is required by Fed. R Civ. P. 56(e) to go beyond the pleadings and designate specific facts showing that there is a genuine issue

for trial. Id. at 324, 106 S.Ct. at 2553. The non-moving party can meet this requirement by presenting affidavits, depositions, answers to the interrogatories or admissions on file. Id. Conclusory allegations unsupported by factual allegations, however, are insufficient to crate a triable issue of fact so as to preclude summary judgment. Marks v. Department of Justice, 578 F.2d, 261, 263, (9th Cir. 1978). Furthermore, a non-moving party who has the burden of proof at trial must present enough evidence that a "fair-minded jury could return a verdict for the [opposing party] on the evidence presented." Anderson v. Liberty Lobby, 477 U.S. 242, 255, 106 S. Ct. 2505, 2512 (1986).

If the nonmoving party's position calls for implausible inferences, the party is required to bring forth more evidence than would otherwise be required. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 1356 (1986).

C. Stafford's Race and Age-Based Discrimination Claim

The California Fair Employment and Housing Act ("FEHA"), Cal. Gov't Code §§ 12940, 12941 prohibits race and age discrimination in employment. When evaluating suits under the FEHA, California state courts apply the legal standards developed under Title VII of the Federal Civil Rights Act, 42 U.S.C. § 2000e et seq. Moisi v. College of Sequoias Community College Dist., 19 Cal.App. 4th 564, --, 25 Cal.Rptr. 2d 165, 170 (1993); University of Southern Calif. v. Superior Court, 222 Cal.App. 3d, 1028, 1035, 272 Cal.Rptr. 264, 268 (1990).

1. Prima Facie Case

In order to prove discrimination through indirect evidence, a plaintiff must adhere to the framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817 (1973); Moisi, 19 Cal.App. 4th 564, 25 Cal.Rptr. 2d at 170. The McDonnell Douglas v. Green framework requires a plaintiff to establish a prima facie case of discrimination by proving:

(1) that he is a member of a protected class;
(2) that he was qualified for the position;
(3) that his employment was terminated; and
(4) that he was replace by a non-protected person.

Rose v. Wells Fargo & Co., 902 F. 2d 1417, 1421 (9th Cir. 1990). The plaintiff must bring forth specific facts supporting a prima facie case to survive a motion for summary judgment on a FEHA claim. Stallcop v. Kaiser Foundation Hospitals, 820 F.2d 1044, 1050-51 (9th Cir.), cert. denied, 484 U.S. 986, 108 S. Ct. 504 (1987). MDC contends that Stafford fails to meet the minimum requirements for establishing a prima facie case of discrimination. In so arguing, however, MDC concedes that Stafford is a member of a protected class, was qualified for his position, and was discharged. The only element of the prima facie case at issue here is whether Stafford was replaced by a nonprotected class member. Stafford brings forth evidence that his duties were ultimately taken over by a younger white woman. MDC brings forth evidence disputing this. Because this is an issue of disputed fact, the Court will assume for the purposes of this motion that Stafford meets the requirement of the McDonnell Douglas Corp. v. Green test. The Court notes, in any event, that when an employee is discharged because of a RIF, the last

element of the prima facie case, replacement by a non-protected person, may not be required. Wallis v. J.R. Simplot Co., 26 F.3d 885, 891 (9th Cir. 1994). Because the Court assumes that Stafford states a prima facie case of race and age-based discrimination under McDonnell Douglas v. Green, the burden of production shifts to MDC.

2. Evidence of Pretext

Once a plaintiff proves a prima facie case of discrimination, the burden of producing evidence then shifts to the defendant to show that it had a legitimate reason for its actions. St. Mary's Honor Center v. Hicks, -- U.S. --, 113 S. Ct. 2742, 2747 (1993). If the defendant can so demonstrate, the prima facie case is rebutted and disappears. Id. at 2747, 2749. Plaintiff then has the burden of showing that defendant's reason was pretextual and that defendant's actions were motivated by impermissible discrimination. Id. at 2747.

Even if Stafford established a prima facie case of discrimination, this Court is still free to grant summary judgment on the claim. Wallis v. J.R. Simplot Co., 26 F.3d 885, 890 (9th Cir. 1994); University of Southern Calif. v. Superior Court, 222 Cal.App. 3d at 1039, 272 Cal.Rptr. at 271. On a summary judgment motion, once a defendant has offered a legitimate, non-discriminatory reason for its actions, the court is left with the "ultimate questions of whether [the plaintiff] has offered evidence sufficient to permit a rational trier of fact to find that [the defendant] intentionally discriminated against him.... " Wallis v. J. R. Simplot Co., 26 F.3d at 892. In order to avoid summary judgment, the plaintiff must produce "specific substantial evidence of pretext." Id. at 890 (quoting Steckl v. Motorola, Inc., 703 F.2d 392, 393 (9th Cir 1983)). At all times, the

plaintiff bears the ultimate burden of persuasion that the defendant's decision was actually motivated by unlawful discrimination. St. Mary's Honor Center, 113 S. Ct. at 2749.

Assuming that Stafford states a prima facie case under the McDonnell Douglas v. Green framework, the burden shifts to MDC to show that it had a legitimate non-discriminatory basis for discharging Stafford. It is undisputed that MDC was suffering severe economic problems which necessitated reductions in force. It is further undisputed that Business Manager Miller was required to lay off three of the twelve Group Leaders. Nor is it disputed that two white Group Leaders over the age of forty were laid off along with Miller, while two other black Group Leaders, one of whom was older than Miller, were retained. Additionally, Stafford concedes that he had the same overall performance evaluation rating as ten other Group Leaders. Furthermore, Stafford does not dispute that the two more highly ranked Group Leaders were not laid off.

MDC brings forth evidence showing that Miller made the termination decision in good faith, based on the need to eliminate three Group Leaders and on his opinion that Stafford, while well-qualified for the position, ranked lower on the lay-off "totem pole." Furthermore, it is uncontroverted that MDC needed to make the reductions in force. MDC therefore brings forth evidence demonstrating that it had a legitimate, nondiscriminatory reason for discharging Stafford.

The burden now shifts to Stafford to show that MDC's reason for discharging him was pretextual, and that the discharge was motivated by unlawful discrimination. Stafford argues that (1) there was a hostile racial environment

at MDC; (2) his fellow Group Leaders were biased against him, as shown by their numerous comments to him about his retiring or otherwise leaving so that their jobs would be more secure; (3) the peer ranking procedure (a) was inconsistent with MDC's usual lay-off procedures; and (b) was inaccurate because the Group Leaders were not told what evaluation factors to consider, nor given the opportunity to observe each other's work; (4) Miller singled him out for harsh treatment; (5) because Stafford was on special assignment at another location from April 1992 to December 1992, Miller and the other Group Leaders did not have adequate time to observe and accurately evaluate him; (6) insufficient time was devoted to the lay off process.

Essentially, Stafford alleges that a "buddy-buddy" clique existed at MDC among the Group Leaders, and that he was excluded from that clique based on his race and age. Stafford contends that this "buddy-buddy" system resulted in his low peer evaluation ranking, which admittedly was considered by Miller in deciding to discharge Stafford. Stafford further alleges that Miller acceded to this impermissible targeting. Miller is also African-American and, according to Stafford, was also the target of racial attacks.

However, Stafford brings forth no evidence showing that the alleged race and age-based animus displayed by the Group Leaders was causally related to his discharge. The case law is clear that there must be a causal nexus between the alleged discriminatory animus and the discharge. DeHorney v. Bank of Am. Nat'l Trust & Sav. Ass'n, 879 F.2d 459, 468 (9th Cir. 1989) (affirming summary judgment because there was no evidence that the supervisor who expressed racial animus was involved in employee's termination); See Nesbit v. Pepsico, Inc., 994 F.2d 703, 705

(9th Cir. 1993) (holding that because the statement "[w]e don't necessarily like grey hair" was ambiguous and not directly tied to the plaintiff's termination, the remark was insufficient to avoid summary judgment on an age discrimination claim). The Ninth Circuit has held that "stray remarks" evincing discriminatory animus are insufficient to avoid summary judgment when those remarks are unrelated to the decisional process. Merrick v. Farmers Ins. Group, 892 F. 2d 1434, 1438 (9th Cir. 1990). Even assuming that all the Group Leaders displayed race and age-based bias against Stafford, there is no evidence that this bias caused his low peer-rankings.

Even more importantly, Stafford has not controverted the evidence put forth by MDC that Miller made the termination decision according to his personal evaluation of Stafford, and that the rankings conformed with, rather than created, Miller's own evaluation of Stafford. In other words, even if the Group Leaders' evaluation of Stafford was based on impermissible bias, Stafford fails to bring forth evidence showing that this impermissible bias motivated Miller's ultimate decision to discharge Stafford.

Moreover, Stafford fails to bring forth any evidence supporting his contention that the selection process itself demonstrates that his discharge was motivated by impermissible discrimination. The evidence demonstrates that the Group Leaders were told to rank each other according to their qualifications to do the remaining work. Furthermore, the evidence is uncontroverted that Miller monitored Stafford's work after Stafford returned from special assignment. Stafford points to no specific policy or guideline which was violated by Miller's discharge of Stafford. At most, he argues that Miller paid insufficient attention to the written performance evaluations. However,

there is evidence that Miller, having completed those performance evaluations around the same time the layoff decisions were made, was fully aware of those evaluations.

Lastly, Stafford makes general allegations about the discriminatory layoffs of other African-American employees. These allegations are insufficient to preclude summary judgment. See Martin v. Lockheed Missiles & Space Co., Inc., 29 Cal.App. 4th 1733-35, 35 Cal.Rptr. 181, 189-190 (1994).

The Court thus finds that the evidence adduced by Stafford to show that MDC's reason for terminating him was pretextual does not raise a genuine issue of material fact. Stafford's evidence does not raise an inference of discrimination sufficient to avoid summary judgment on his FEHA claims. Thus, the Court GRANTS MDC's motion for summary judgment on Stafford's FEHA claims.

D. Plaintiff's Contract Claims

1. Breach of Implied Contract Claim

Stafford further alleges that his termination breached an implied employment contract between him and MDC which allowed him to be terminated only with good cause. MDC maintains that Stafford was an at-will employee and that no employment contract existed between Stafford and MDC.

Stafford's Opposition fails to expressly point to any evidence of an employment contract. Plaintiff states only that "Plaintiff was a good thirty (30[]) year employee and could be fired only for good cause." (Pl.'s Opp. S.J. at 27.)

In the absence of an express oral or written employment agreement, employment is presumed to be at-will under Cal. Labor Code § 2922. Foley v. Interactive Data Corp., 47 Cal.3d 654, 677, 254 Cal.Rptr. 211, 223 (1988). However, this presumption may be overcome if there is evidence showing the parties' intent to limit the employer's power to terminate. Id. In determining the existence of such an employment agreement, courts should look to (1) the employer's personnel policies; (2) the employee's length of service; (3) the employer's express or implied assurances of continued employment; (4) industry practice. Id. at 680, 254 Cal.Rptr. at 225 (citing Pugh v. See's Candies, Inc., 116 Cal.App.3d 311, 327, 171 Cal.Rptr.917 (1981)).

Stafford claims that the existence of layoff guidelines demonstrates an implied contact. This argument fails under Davis v. Consolidated Freightways, 29 Cal.App 4th 354, 34 Cal.Rptr. 2d 438 (1994). In that case, A California Court of Appeal held that evidence of a multi-layer discharge procedure and a "progressive discipline" system failed to create a triable issue of fact overcoming the at-will presumption. Davis v. Consolidated Freightways, 29 Cal.App.4th at 367, 34 Cal.Rptr. 2d at 445. Moreover, Stafford concedes that he, at best, merely glanced at the MDC policies at issue. Such employer guidelines or procedures may form a part of an implied contract if the employer and employee had a mutual understanding that those rules and procedures applied to the employee. Hillsman v. Sutter Community Hospitals, 153 Cal.App.3d 743, 753, 200 Cal.Rptr. 605, 611 (1984). Stafford fails to demonstrate his own understanding that the policies applied to him. Moreover, even if there was a mutual understanding that MDC's policies constituted an implied contract, Stafford fails to identify any language in the written policies stating that salaried employees may only be terminated with good

cause. Rather, Stafford has testified that it was his understanding when he was previously demoted in 1982 that MDC did not need a reason to downgrade or demote an employee, and that his understanding did not change between 1982 and 1993. Further, Stafford has testified that his understanding that MDC was required to have good cause to terminate its salaried employees was based on "common sense" only.

Stafford's length of service with MDC/DAC clearly weighs in his favor in this analysis. He was employed at MDC/DAC for twenty-nine years. However, Stafford cites no case law for the proposition that this fact by itself is enough for a finding of an implied contract.

The issue of assurances given to Stafford is inconclusive. In his deposition testimony, Stafford remembered receiving only one specific assurance regarding job stability. This assurance does not support his argument that only discharge for good cause was implied by this statement. Furthermore, the promotions and salary increases which Stafford asserts as evidence of an implied contract are insufficient. Miller v. Pepsi-Cola Bottling Co., 210 Cal.App.3d 1554, 1559, 259 Cal.Rptr. 56, 59 (1989). ("Promotions and salary increases are natural occurrences of an employee who remains with an employer for a substantial length of time. These factors should not change the status of an 'at will' employee to one dischargeable only for 'just cause'.").

Lastly, as for the "industry practice" factor, Stafford offers no evidence that it is the practice of the aerospace industry to terminate salaried employees only for good cause.

After considering the four factors set out in Foley, the Court finds that Stafford brings forth no evidence showing a

triable issue of fact as to whether MDC agreed to limit its right to terminate at-will employees such as Stafford. The Court thus finds that no implied contract existed, and that Stafford was an at-will employee. Therefore, the Court GRANTS MDC's motion for summary judgment as to Stafford's breach of implied contract claim.

E. Breach of Implied Covenant of Good Faith and Fair Dealing Claim

An at-will employee cannot invoke an implied covenant for good faith and fair dealing. Schneider v. TRW, Inc., 938 F.2d 986, 991 (9th Cir. 1991) (citing Foley, 47 Cal.3d at 698 n.39 254 Cal.Rptr. at 238 n.39). Because the Court finds that Stafford was an at-will employee, Stafford cannot sustain a contract claim for lack of good faith and fair dealing. MDC's motion for summary judgment is therefore GRANTED on this claim.

F. Intentional Infliction of Emotional Distress Claim

MDC contends that the exclusive remedy for Stafford's emotional distress claims is the Workers' Compensation Act. Emotional distress claims arising out of employment are generally compensable only under the Workers' Compensation Act, even if no physical injury is alleged. See Shoemaker v. Myers, 52 Cal.3d 1, 25, 276 Cal.Rptr. 303, 318 (1990); Cole v. Fair Oaks Fire Protection, 43 Cal.3d 148, 160, 233 Cal.Rptr. 308, 315 (1987). As long as the emotional distress claim arises out of conduct which is "a normal part of the employment relationship, such as demotions, promotions, criticism of work practices, and frictions in negotiations as to grievances," the claim falls under the exclusivity provision of the Workers'

Compensation Act. Cole v. Fair Oaks, 43 Cal.3d at 160, 233 Cal.Rptr. at 315. Discharge is considered a customary part of the employment relationship. Shoemaker, 52 Cal.3d at 25, 276 Cal.Rptr. at 318; Robomatic v. Vetco Offshore, 225 Cal.App.3d 270, 274, 275 Cal.Rptr. 70, 73 (1990).

However, exposure to discrimination prohibited by state law is not considered a "normal incident of employment." Watson v. Department of Rehabilitation, 212 Cal.App.3d 1271, 1287, 261 Cal.Rptr. 204, 213 (1989). Employees subject to racial discrimination in the workplace are therefore not preempted by the Workers' Compensation Act from bringing claims for intentional infliction of emotional distress. Id.. The California Supreme Court has held that when an employer's decision to discharge an employee is based on an animus which violates constitutional or statutory provisions, such misconduct is not a normal part of the employment relationship or "'a risk reasonably encompassed within the compensation bargain.'". Gantt v. Sentry Ins., 1 Cal. 4th 1083, 1100, 4 Cal.Rptr.2d 874, 885 (1992) (quoting Shoemaker v. Myers, 52 Cal.3d at 160, 276 Cal.Rptr. 303). Such discharges are against public policy and thus claims for emotional distress relating to the discharges are not preempted. Maynard v. City of San Jose, 37 F.3d 1396, 1405-06 (9th Cir. 1994) (employee fired contrary to state law for investigating and reporting possible discriminatory practice was not preempted by the Workers' Compensation Act from bringing emotional distress claim).

Although Stafford is not preempted by the Workers' Compensation Act from bringing his emotional distress claim, his emotional distress claim is time-barred. Pursuant to Cal. Civ. Proc. Code § 340(3), there is a one year statute of limitations on emotional distress claims. Murphy v. Allstate Ins. Co., 83 Cal.App.3d 38, 50, 147 Cal.Rptr. 565,

575 (1978). Stafford's discharge was effective April 1993. However, he did not file this action until July 21, 1994, a year and some months after his cause of action for emotional distress accrued. Stafford argues that the doctrine of equitable tolling applies because he filed a discrimination claim with the Department of Fair Employment and Housing (DFEH") on September 26, 1993. However, even if this Court equitably tolled the statute of limitations during the pendency of Stafford's DFEH claim, Stafford's emotional distress claim is still untimely because his DFEH claim was resolved as of October 7, 1993. His emotional distress claim should thus be tolled only for the two weeks of its pendency before the DFEH. Stafford's claim would still be untimely.

The Court thus holds that, although Stafford's emotional distress claim is not preempted by the exclusivity provision of the Workers' Compensation Act, that claim is untimely. Therefore, the Court GRANTS MDC's motion for summary judgment on that claim.

G. Punitive Damages Claim

Because the Court hereby grants summary judgment on Stafford's substantive claims, the Court also GRANTS summary judgment as to Stafford's claim for punitive damages.

IV. Conclusion

Stafford fails to bring forth sufficient evidence of material disputed facts demonstrating that MDC's reason for terminating him was a pretext for race or age-based discrimination. Therefore, the Court GRANTS summary judgment on his FEHA claims. Stafford further fails to bring forth evidence of a genuine issue of material fact as to the

existence of an implied contract between MDC and Stafford. The Court therefore finds that Stafford was an at-will employee, and, therefore no employment contract existed between Stafford and MDC. The Court therefore GRANTS summary judgment on Stafford's breach of contract and breach of implied covenant of good will claims. Lastly, the court finds that Stafford's intentional infliction of emotional distress claim is time-barred and GRANTS summary judgment on those claims. MDC's motion for summary judgment is thus GRANTED in its entirety.

The Court hereby incorporates Defendant MDC's uncontroverted facts and conclusions of law as amended.

IT IS SO ORDERED.

/s/
RONALD S.W. LEW
United States District Judge

DATED: June 22, 1995

NO CV-94-5771-RSWL Stafford v. McDonnell Douglas Corporation, Def's Mot. S.J.

(orders\stafford.sj\j)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED OCT 30 1996

LONNIE C. STAFFORD,	)	
	)	No. 95-56109
Plaintiff-Appellant,	)	
	)	DC No. CV-94-05771-
v.	)	RSWL
	)	
McDONNELL DOUGLAS CORPORATION,	)	
	)	ORDER
Defendant-Appellee.	)	
	)	

The judges on the panel to which this case has been assigned have unanimously determined that the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument. See Fed. R. App. 34 and Ninth Cir. R. 34-4. Accordingly, this case shall be submitted on the briefs and records on November 4, 1996 in Pasadena, California, without oral argument.

FOR THE COURT

CATHY A. PATTERSON
CLERK OF COURT

/s/
Gwendolyn Baptiste
Deputy Clerk

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED NOV 7 1996

LONNIE C. STAFFORD,	)	
	)	No. 95-56109
Plaintiff-Appellant,	)	
	)	DC No. CV-94-05771-RSWL
v.	)	
	)	
McDONNELL DOUGLAS CORPORATION,	)	ORDER*
	)	
Defendant-Appellee.	)	
	)	

Appeal from the United States District Court
for the Central District of California
Ronald S.W. Lew, District Judge, Presiding

Submitted November 4, 1996**
Pasadena, California

Before: GOODWIN, WIGGINS and NOONAN, Circuit Judges.

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* This disposition is not appropriate for publication and many not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel finds this case appropriate for submission without argument pursuant to 9th Cir. R. 34-4 and Fed. R. App. P. 34(a).

Lonnie C. Stafford's appeal from the District of Central California's grant of summary judgment to McDonnell Douglas Corporation is dismissed and the district court's judgment is vacated and the case is remanded to the district court with instructions to remand the case to the state court for lack of subject matter jurisdiction. McDonnell Douglas Corp. failed to establish the requisite amount in controversy pursuant to 28 U.S.C. §§ 1332 and 1441. See Sanchez v. Monumental Life Ins. Co., 95 F.3d 856 (9th Cir. 1996); Gaus v. Miles, Inc., 980 F.2d 564 (9th Cir. 1992).

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED APR 11 1997

LONNIE C. STAFFORD,	)	
	)	
Plaintiff-Appellant,	)	No. 95-56109
	)	
v.	)	DC No. CV-94-05771-RSWL
	)	
McDONNELL DOUGLAS CORPORATION,	)	**ORDER TO FILE RESPONSE**
	)	
Defendant-Appellee.	)	
	)	

Before: GOODWIN, WIGGINS and NOONAN, Circuit Judges.

The Plaintiff/Appellant, Lonnie C. Stafford, is ORDERED to file a response, not to exceed ten (10) pages, to McDonnell Douglas Corporation's Petition for Rehearing with Suggestion for Rehearing En Banc within twenty one (21) days of the issuance of this order.

IT IS SO ORDERED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED SEP 16 1997

LONNIE C. STAFFORD,	)	
	)	
Plaintiff-Appellant,	)	No. 95-56109
	)	
v.	)	DC No. CV-94-05771-RSWL
	)	
McDONNELL DOUGLAS CORPORATION,	)	**ORDER**
	)	
Defendant-Appellee.	)	
	)	

Before: GOODWIN, WIGGINS and NOONAN, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and recommended rejection of the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.

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FILED FEB 1 1995
ENTERED FEB 3 1995

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d).

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Lacy Kirk Sykes, Jr.,	)	
	)	CV 93-7803-KN
Plaintiff,	)	
	)	**ORDER GRANTING**
v.	)	**DEFENDANT'S**
	)	**MOTION FOR**
McDonnell Douglas Corp.,	)	**SUMMARY**
	)	**JUDGMENT**
Defendant.	)	
_____	)	

As a result of Plaintiff's termination from Defendant's employ, he filed this state action for: (1) breach of an implied-in-fact employment contract; (2) breach of the implied covenant of good faith and fair dealing; and (3) violation of the California fair Employment and Housing Act. Defendant removed the action to this court on diversity jurisdiction, and now moves for summary judgment. For the reasons that follow, the court GRANTS Defendant's motion.

UNDISPUTED FACTS

The following facts are without substantial controversy. Plaintiff, an African-American, was hired by Defendant McDonnell Douglas Company ("MDC") in January, 1985 as a security guard at McDonnell Douglas Space Systems Company ('MDSSC"). (P's Depo., 38:12-14.) John Melde is, and was Senior Manager of the Security Protection Services ("SPS") division of the Security Department at MDSSC. (Melde Decl., ¶ 1.) In July, 1989, Melde promoted Plaintiff to Shift Manager. As a Shift Manager, Plaintiff was in charge of approximately twenty-five security officers and reported directly to Melde. (P's Depo., 79:8 - 81:4.). In May 1991, Melde promoted Plaintiff to Staff Manager. As a Staff Manager, Plaintiff assisted the Shift Managers as well as managed hourly security officers. His duties also included various specialized tasks, such as operating and maintaining the computerized security alarms. (Melde Decl., ¶ 4.) Traditionally, the person who held the Staff Manager position was slated for promotion to Senior Manager. (Id., ¶ 3.) The Staff Manager position, by its very nature, required the highest degree of honesty, integrity, and good judgment. (Melde Decl., ¶ 20.)

During his tenure as manager, Plaintiff had received various work-related complaints, including leaving the plant without maintaining radio contact, (P's Depo., p. 379-8- & Exh. 312), leaving a loaded gun on the front seat of an unlocked car, (P's Depo., p. 382 & Exh. 313), carrying a concealed weapon off company premises without a license and not in uniform, (Melde Decl., ¶ 6), and lying about

being sick. (Melde Decl., ¶ 8 P's Depo. Exh. 315).[1]

On Sunday, August 8, 1993, Plaintiff accompanied an hourly employee, Wesley McDowell, to breakfast. At the time, the hourly employee was being investigated for absenteeism. They took 40 minutes for breakfast. (Melde Decl. ¶ 17 & Exh. 5.) Because (1) hourly employees are paid double-time on Sundays (P's Depo. p. 280, 495; Melde Decl. ¶ 16); (2) hourly employees are never entitled to more than ten to fifteen minutes for breaks (Melde Decl. ¶ 18 & Exh. 6); and (3) it was well known that McDowell had been a notorious time abuser who had been in trouble with his supervisors for years as a result (P's Depo. p. 280-83, Williams Depo. p. 30-32, Melde Decl. ¶ 16), Defendant claims that this event finally led to Plaintiff's termination.[2] Plaintiff was terminated on August 12, 1993.

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[1]Plaintiff's only rebuttal to Defendant's evidence regarding these performance deficiencies is that his accusers cannot remember whether or not reports were written about the incidents. See P's Statement of Genuine Issues. Plaintiff does not deny, through declaration or otherwise, that these events occurred.

[2]Plaintiff claims that he thought McDowell was taking his lunch, for which he had 42 minutes. (P's Depo., p. 271-74.) Defendant claims Plaintiff must have known McDowell was not taking a "lunch" because they left one half hour after McDowell arrived to work. This dispute need not be resolved for purposes of this summary judgment motion.

ANALYSIS

I. Legal Standard

Because these matters are before the Court on motions for summary judgment, the Court "must determine whether, viewing the evidence in the light most favorable to the nonmoving party, there are any genuine issues of material fact." Washington v. Garrett, 10 F.3d 1421, 1428 (9th Cir. 1993). In other words, the Court "is not to weigh the evidence or determine the truth of the matter but should only decide whether there is a genuine issue for trial." Id.

II. Plaintiff's First Cause of Action

Plaintiff's First Cause of Action alleges a breach by Defendant of an implied-in-fact agreement not to terminate without cause. California Labor Code ¶ 2922 provides, "An employment, having no specified term, may be terminated at the will of either party on notice to the other." The California Supreme Court has held that this statute "creates a presumption of at-will employment." Foley v. Interactive Data Corp., 47 Cal.3d 654, 677 (1988). In the case of Plaintiff, this statutory presumption is bolstered by the employment agreement he signed on the first day of his employment, which provided, "I [Plaintiff] understand that this employment relationship is at will and may be terminated by either party at any time." (P's Depo., 373:10-25 & Exh. 309.)

Plaintiff contends that, despite this express contractual provision that his employment was at-will, events occurring subsequent to his initial employment create a triable issue of material fact as to whether there existed at the time of his termination an implied-in-fact agreement that Defendant

could only terminate Plaintiff for cause. The only evidence Plaintiff offers to demonstrate the existence of an implied-in-fact agreement is the following statement from his own declaration:

> Communication of any alleged violation of standards of performance and behavior required that such employee's manager first inform such offending employee of his violation, and that a written record of their discussion was then being made. Before an employee could be terminated for such violation, it was necessary to give him three records of discussion followed by a written formal, "corrective interview." Two or three such corrective interviews given could lead to that employee's termination.
>
> Such procedure was applicable to all employees, be they managers or hourly employees. It is reflected in extensive written company procedure manuals, which all managers, including myself, were required to observe. John Melde explained such procedures to myself and other managers during various management training classes.

(P's Decl., ¶ 3.) Plaintiff does not submit any of these written procedure manuals as evidence.

Plaintiff's evidence is insufficient to withstand Defendant's motion for summary judgment on this issue for two reasons. First, under California law, an employee cannot "establish an implied-in-fact contract to terminate only for cause when the original employment agreement clearly defined the relationship as employment at-will." DeHorney v. Bank of America Nat'l Trust & Sav. Assoc., 879 F.2d 459, 466 (9th Cir. 1989); see Foley, 47 Cal.3d at 680 n.23;

Rochlis v. Walt Disney Co., 19 Cal.App.4th 201, 211 (1993), overruled on other gds., 7 Cal.4th 1238, 1251 (1994) ("There cannot be a valid express contract and an implied contract, each embracing the same subject, but requiring different results. [Citations.] Therefore, [the employee's] allegations of an implied-in-fact contract for continuing employment and benefits cannot rebut his status as an at-will employee." (alterations in original)); Shapiro v. Wells Fargo Realty Advisors, 152 Cal.App.3d 467, 482 (1984) (same).

Second, even if California law were, in exceptional circumstances, to allow an implied-in-fact agreement to modify an express at-will employment agreement, Plaintiff's evidence, consisting solely of an unsupported declaration, is insufficient as a matter of law. See Anderson v. Liberty Lobby Inc., 477 U.S. 242, 252 (1986) (stating that when the nonmoving party is the plaintiff, "[t]he mere scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff"). Accordingly, Defendant's motion for summary judgment is **GRANTED** with respect to Plaintiff's First Cause of Action.[3]

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[3]In so doing, the Court declines to rule on Defendant's alternative argument for summary judgment -- that even if there was an agreement to not to terminate without cause, Defendants had sufficient cause, Defendants had sufficient cause as a matter of law. While it may be that Defendants would be entitled to summary judgment on this point, especially given the "substantial scope for the exercise of subjective judgment" afforded an employer when the "employee occupies a sensitive managerial or confidential position," Pugh v. See's Candies, Inc., 116 Cal.App.3d 311, 330 (1981), the Court's finding that Plaintiff's employment

III. Plaintiff's Second Cause of Action

Plaintiff's Second Cause of Action alleges a breach of the implied covenant of good faith and fair dealing inherent in his employment contract. This cause of action fails for the same reason the First Cause of Action fails, for "when an employment contract expressly provides that it may be terminated at will or for any reason, as the employment contract indisputedly did here, the covenant of good faith and fair dealing cannot be used to imply a requirement for good cause to terminate. Rose v. Wells Fargo & Co., 902 F.2d 1417, 1426 (9th Cir. 1990); see Foley, 47 Cal.3d at 698, n.39. Accordingly, Defendant's motion for summary judgment is **GRANTED** with respect to Plaintiff's Second Cause of Action.

IV Plaintiff's Third Cause of Action

Plaintiff's Third Cause of Action alleges a violation of Cal. Gov't Code § 12940, which prohibits the discrimination against an employee because of his race with respect to the "terms, conditions, or privileges of employment." The only evidence Plaintiff offers in support of his claim in his declaration that on three occasions he had seen black employees receive harsher discipline than white employees for what he believed to be similar conduct.

The Court finds that this evidence is insufficient to withstand Defendant's motion for summary judgment. Defendant has submitted uncontroverted evidence that its policy was to terminate managerial employees who knew about and condoned incidents of clearcut, deliberate time

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contract was at-will obviates the need to rule on this issue.

abuse by hourly or subordinate employees. (See Decl. of Chris Eagle.) Thus, even assuming, arguendo, that Plaintiff's evidence could establish a prima facie case of discrimination,[4] summary judgment is appropriate because Plaintiff has offered nothing to indicate Defendant's nondiscriminatory reason for his termination was pretextual. Wallis v. J.R. Simplot Co., 26 F.3d 885, 890 (9th Cir. 1994); Univ. of Southern California v. Superior Ct., 222 Cal.App.3d 1028, 1039-40 (1990); Crossier v. United Parcel Service, Inc., 150 Cal.App.3d 1132, 1139 (1983). Accordingly, Defendant's motion for summary judgment is **GRANTED** with respect to Plaintiff's Third Cause of Action.

CONCLUSION

Defendant's motion for summary judgment is **GRANTED**.

IT IS SO ORDERED.

DATED: January 31, 1995

/s/
DAVID V. KENYON
UNITED STATES DISTRICT JUDGE

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[4]The Court does not believe that the isolated, unrelated events Plaintiff complains of are in fact sufficient to establish a prima facie case.

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED NOV 7 1996

LACY KIRK SYKES, JR.,	)	
	)	No. 95-55924
Plaintiff-Appellant,	)	
	)	DC No. CV-93-7803-DVK
	)	
	)	
McDONNELL DOUGLAS CORPORATION,	)	ORDER*
	)	
Defendant-Appellee.	)	
	)	

Appeal from the United States District Court
for the Central District of California
David V. Kenyon, District Judge, Presiding

Submitted November 4, 1996**
Pasadena, California

Before: GOODWIN, WIGGINS and NOONAN, Circuit Judges.

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* This disposition is not appropriate for publication and many not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel finds this case appropriate for submission without argument pursuant to 9th Cir. R. 34-4 and Fed. R. App. P. 34(a).

Lacy Kirk Sykes, Jr.'s appeal from the District of Central California's grant of summary judgment to McDonnell Douglas Corporation is dismissed and the district court's judgment is vacated and the case is remanded to the district court with instructions to remand the case to the state court for lack of subject matter jurisdiction. McDonnell Douglas Corp. failed to establish the requisite amount in controversy pursuant to 28 U.S.C. §§ 1332 and 1441. See Sanchez v. Monumental Life Ins. Co., 95 F.3d 856 (9th Cir. 1996); Gaus v. Miles, Inc., 980 F.2d 564 (9th Cir. 1992).

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED MAY 15 1997

LACY KIRK SYKES, JR.,	)	
	)	
Plaintiff-Appellant,	)	No. 95-55924
	)	
v.	)	DC No. CV-93-7803-DVK
	)	
McDONNELL DOUGLAS CORPORATION,	)	**ORDER**
	)	
Defendant-Appellee.	)	
	)	

Before: GOODWIN, WIGGINS and NOONAN, Circuit Judges.

The Defendant/Appellee's, McDonnell Douglas Corporation, Motion for Leave to File a Petition for Rehearing and Suggestion for Rehearing En Banc is granted. IT IS SO ORDERED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED JUN 4 1997

LACY KIRK SYKES, JR.,	)	
	)	
Plaintiff-Appellant,	)	No. 95-55924
	)	
v.	)	DC No. CV-93-7803-DVK
	)	
McDONNELL DOUGLAS CORPORATION,	)	**ORDER**
	)	
	)	
Defendant-Appellee.	)	
	)	

Before: GOODWIN, WIGGINS and NOONAN, Circuit Judges.

Appellant is requested to file a response to Appellee's Petition for Rehearing and Suggestion for Rehearing En Banc within 14 days from the filing date of this order.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED SEP 16 1997

LACY KIRK SYKES, JR.,	)	
	)	
Plaintiff-Appellant,	)	No. 95-55924
	)	
v.	)	DC No. CV-93-7803-DVK
	)	
McDONNELL DOUGLAS CORPORATION,	)	**ORDER**
	)	
	)	
Defendant-Appellee.	)	
	)	

Before: GOODWIN, WIGGINS and NOONAN, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and recommended rejection of the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.

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